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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1960.

No. ~~138~~. 6

CHARLES W. BAKER et al.,
Appellants,

vs.

JOE C. CARR, Secretary of State, State of Tennessee; GEORGE F. McCANLESS, Attorney General of Tennessee; JERRY McDONALD, Coordinator of Elections, State of Tennessee; and
DR. SAM COWARD, JAMES ALEXANDER, and HUBERT BROOKS, Members of the State Board of Elections, State of Tennessee,
Appellees.

On Appeal from the District Court of the United States for the Middle District of Tennessee.

BRIEF AND ARGUMENT FOR APPELLEES.

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1960.

No. 103.

CHARLES W. BAKER et al.,
Appellants,

vs.

JOE C. CARR, Secretary of State, State of Tennessee; GEORGE F. McCANLESS, Attorney General of Tennessee; JERRY McDONALD, Coordinator of Elections, State of Tennessee; and DR. SAM COWARD, JAMES ALEXANDER, and HUBERT BROOKS, Members of the State Board of Elections, State of Tennessee,
Appellees.

On Appeal from the District Court of the United States for the Middle District of Tennessee.

BRIEF AND ARGUMENT FOR APPELLEES.

OPINION BELOW.

This suit was commenced in the United States District Court, Middle District of Tennessee, and was heard by a three-judge court pursuant to 28 U. S. C. A. 2281. Upon motion by the appellees, the complaint challenging the constitutionality of the State's 1901 legislative apportionment statute was dismissed. The three-judge court unanimously held that under the applicable decisions of this

Court the suit could not be entertained on the theory of a denial of equal protection of the laws under the Fourteenth Amendment. The carefully reasoned opinion of the District Court follows the doctrine of stare decisis and, therefore, the complaint was dismissed since the issues in this case are clearly controlled by applicable decisions previously announced by this Court. The opinion is reported at 179 F. Supp. 824.

JURISDICTION.

The appellees reiterate the insistence made in the "Statement in Opposition to Appellants' Statement of Jurisdiction and Motion to Dismiss" and deny that this Court has jurisdiction. For the reasons stated there and in this brief, the appellees urge that this appeal be dismissed for lack of jurisdiction.

QUESTIONS PRESENTED.

1. Where a state constitution requires the enumeration of voters every ten years as the basis for creating General Assembly districts; where the last enumeration of the voters was made by the General Assembly under a 1901 enactment; and where the complaint alleged that, due to the passage of time and shifts in population and the failure to reapportion as required by the state constitution, the appellants' votes were debased denying them a republican form of government, is a Federal District Court authorized to entertain a suit to require reapportionment of legislative seats, brought against state officers who are neither charged with the constitutional duty of reapportioning the state nor the statutory duty of calling, supervising, or holding elections for members of the General Assembly?

2. Where a state constitution requires the enumeration of voters every ten years as the basis for creating General

Assembly districts; where the last enumeration of the voters was made by the General Assembly under a 1901 enactment; and where the complaint alleged that, due to the passage of time and shifts in population and the failure to reapportion as required by the state constitution, the appellants' votes were debased denying them a republican form of government, (1) does a Federal District Court have jurisdiction of the subject matter, and (2) if so, is the failure of the General Assembly to reapportion (a) such "state action" as comes within the prohibition of the equal protection clause of the Fourteenth Amendment, or (b) a violation of the civil rights statutes?

3. If questions 1 and 2 are answered in the affirmative, can the equity powers of the Federal courts be invoked to require reapportionment of General Assembly districts by judicial fiat?

4. Where the highest court of a state has construed a provision requiring legislative apportionment every ten years as being purely a legislative function and not self-executing nor enforceable by the state courts, and where the state court declared that the legislature, if found to be a de facto body, would be legally impotent so as to destroy the trichotomy of state government, will this Court hold (a) that the state court decision is not binding on this Court when this Court refused to entertain an appeal involving the same issues in 1956 (Kidd v. McCanless, 352 U. S. 920), and (b) that the failure of the General Assembly to follow the state constitution under such circumstances is a denial of equal protection of the laws under the Fourteenth Amendment?

5. If the equity powers of the Federal courts cannot be exercised to redistrict because of inequality of **representation in Congress**, will such equity powers be exercised to require reapportionment to correct inequality of **representation in a state legislature**?

STATEMENT.

The appellants, as individuals and as voters of the State of Tennessee, sued six officials of the State alleging a denial of the equal protection of the law because of the failure of the General Assembly to reapportion legislative districts on the basis of the number of qualified voters as provided by the state constitution.

After filing the action, the Mayor of the City of Nashville, Tennessee, was permitted to intervene as a plaintiff in the District Court on behalf of himself and all of the residents of said city (R. 99). The City of Chattanooga and the City of Knoxville were also allowed to intervene as plaintiffs (R. 221-222).

Posited against the allegations in the complaint, the appellees have filed a motion to dismiss. Before the Court reaches the basic complaint of the appellants, it must decide whether the appellants have a right to maintain this suit and whether the appellees have such duties in connection with the premises as will permit this suit to be maintained against them. Obviously, the appellants have no interest in the subject matter which is different from any other voter in Tennessee. Moreover, the appellees are not sued as individuals but as officers of the State who have no constitutional nor statutory duties concerning reapportionment and neither do they supervise or conduct elections.

The appellants averred that the Constitution of Tennessee, Article II, Sections 4, 5, and 6, directs the Legislature at the expiration of each ten-year period to make an enumeration of the qualified voters and to apportion the members of the Legislature among the several counties or districts according to the number of qualified voters therein, but that no reapportionment has been made by the Legislature since 1901 and that the distribution of legislative seats remains substantially as provided in the Act of 1901.

The appellants further averred that due to the passage of time and shifts or changes in population since 1901, the present legislative distribution is disproportionate to the distribution of population in the state. It should be noted that the Constitution of Tennessee requires apportionment to be based on the number of qualified voters rather than on the basis of population.

As a consequence of the failure of the Legislature to enact new apportionment legislation, the appellants averred that the General Assembly of the State of Tennessee is no longer a representative body, that a minority now rules in Tennessee, and that the State of Tennessee no longer enjoys the republican form of government guaranteed by the Constitution of Tennessee and the Constitution of the United States (R. 12-13).

The appellants averred that inequality of legislative representation constitutes a dilution of their voting rights and hence a denial of the equal protection of the law guaranteed by the Fourteenth Amendment. The appellants further averred that inequality of representation has resulted in legislative discrimination against them with respect to the allocation of the burdens of taxation and the distribution of funds derived from the state through the exercise of the taxing power.

The District Court was asked: (1) to declare the apportionment Act of 1901 unconstitutional and to enjoin its enforcement, (2) to order an election at large without regard to counties or districts, and (3) in the alternative to direct the appellees to hold an election in accordance with the formula of legislative representation provided in the Constitution of Tennessee, using the 1950 or a subsequent federal census to determine the number of qualified voters (R. 19-20).

The appellees filed a motion to dismiss on the grounds that the District Court did not have jurisdiction of the

subject matter of the suit, that the appellants had not stated a claim upon which relief could be granted, and that indispensable parties had not been joined (R. 46-47).

The three-judge Court unanimously sustained the motion and denied relief.

The District Court held that this Court, in **Kidd v. McCanless**, 352 U. S. 920, had considered the identical Tennessee apportionment statutes and the identical state of facts and had not only rejected the appellants' contentions but had supported its decision in **Radford v. Gary**, 352 U. S. 991, denying relief, by citing **Kidd v. McCanless** together with **Colegrove v. Green**, 328 U. S. 549 (R. 216-217).

The District Court further held that the remedies suggested were neither feasible nor legally possible. To declare the present Tennessee apportionment statutes unconstitutional would result in the destruction of the state government, as held by the Supreme Court of Tennessee in **Kidd v. McCanless.** The Court further held that to order an election at large would be neither practical nor legal. The Court could not supervise an election and such election, if held, would result in geographical inequalities and discriminations. If a legislature were elected, the Court could not compel it to enact new apportionment legislation.

The District Court then held that Tennessee apportionment legislation must be based on an enumeration of the qualified voters, that such enumeration is a legislative function, and that for the Court to exercise the function would constitute judicial legislation and an unwarranted intrusion into the political affairs of the State of Tennessee.

The Court, therefore, sustained the motion to dismiss (R. 214-220).

SUMMARY OF ARGUMENT.

This case involves issues which are at the very heart of the increasingly difficult and delicate field of state and federal relationships. The most sensitive issue is whether or not this Court will disregard its prior decisions and those firmly imbedded historical concepts concerning the apportionment of state legislatures and inject the federal judiciary into the arena of state political conflict, or use it as an instrument of local political coercion.

The reasons are numerous and cogent why the Court, without hesitation, should affirm the judgment of the District Court.

The failure of the appellants to sue officials having duties relating to legislative apportionment or to holding and conducting elections is fatal. Since indispensable parties have not been sued the Court cannot grant relief because those having such duties would not be bound by a decree in this case.

The rule is elementary that there must be parties before the Court with opposing legal interests. In their absence, the suit must fail for want of justiciability. Here, the appellants, as voters, have interests which are the same as all other Tennessee voters. Special injury is not alleged. Similarly, the appellees have no constitutional or statutory duties concerning apportionment or elections for members of the General Assembly. Thus, a decree of the Court would bind no one and would be advisory only.

In substance, the suit is against the State, contrary to the Eleventh Amendment. The obvious purpose of the suit is to control the sovereign—i. e., the exercise of state legislative power. This result is sought by coercing state action by suing the appellees who are state administrative and judicial officers.

The appellants claim a dilution of their voting rights resulting in unequal or disproportionate representation in the General Assembly. They erroneously argue that they are the subjects of purposeful and systematic discrimination. However, they do not claim that they have been denied the right to vote in free elections, or that their votes have not been counted when cast for members of the General Assembly. It follows that the nexus of the complaint is the denial of a republican form of government. The Constitution expressly declares that this problem addresses itself to Congress instead of the federal judiciary.

The argument that the state government is not republican in form because representation is not based upon "population" is as old as the republic itself. As every student knows, the population concept was compromised and found inadequate by the framers of the Constitution who adopted a different formula for selecting United States Senators. Whether or not the appellants' votes have less weight in electing legislators than their "country cousins", or whether or not the appellants have been denied a republican form of government, depends upon subjective definitions because Congress, if it could, has not set standards or prescribed criteria to formulate the basis of judicial judgment.

Although the right to vote for members of Congress is derived from Article I, Section 2, of the Constitution of the United States, the doctrine of judicial self-limitation was applied in **Colegrove v. Green,** 328 U. S. 549. There the Court declared that the issues were peculiarly political and the federal judiciary should not be injected into the politics of the people by apportioning Congressional districts. The case at bar deals with the right to vote for members of the state legislature. This is a state right. On the other hand, **Colegrove v. Green** dealt with the right to vote for members of Congress, which is a federal right.

Although a much stronger case was before the Court in that case, the Court correctly refused to enter the ". . . political thicket".

The recent decisions of this Court control the case at bar. **South v. Peters**, 339 U. S. 276; **Cox v. Peters**, 342 U. S. 936; **Remmey v. Smith**, 342 U. S. 916; **Anderson v. Jordan**, 343 U. S. 912; **Kidd v. McCanless**, 352 U. S. 920; **Radford v. Gary**, 352 U. S. 991. These cases are to the point that the Federal Courts will not exercise their equity powers in cases posing political issues arising from a state's geographical distribution of electoral strength among its political subdivisions. These cases are indistinguishable from this case and they are an absolute bar to the appellants' claim.

Further, this is not a new problem to the judiciary in Tennessee. **Kidd v. McCanless**, 200 Tenn. 273, certiorari denied, 352 U. S. 920. The state supreme court held that if the present apportionment laws have become unconstitutional with the passage of time, the prior apportionment laws are invalid for the same reason. In the absence of a valid apportionment statute, no means would be provided for holding elections for members of the General Assembly. After declaring that the de facto doctrine cannot be applied to an apportionment statute, the state supreme court concluded:

> "The ultimate result of holding this Act unconstitutional by reason of the lapse of time would be to deprive us of the present legislature and the means of electing a new one and ultimately bring about the destruction of the State itself." 200 Tenn. 282.

The destruction of a coordinate branch of state government would be fatal to the American tripartite constitutional system. In view of the holding in the Kidd case, the state supreme court, in substance, has construed these pro-

visions of the state constitution as not being self-executing or mandatory upon the Legislature. In effect, the appellants now beseech this Court to over-turn the Tennessee decision and declare those provisions in the state constitution to be either self-executing or mandatory.

The appellants have summarized the prayers of the complaint in the District Court. They sought four types of relief (Brief for Appellants, pp. 15-16).

First, they sought an injunction against the appellees to restrain the enforcement of the 1901 apportionment statute. Second, the appellants prayed that the 1901 apportionment law be declared unconstitutional and its enforcement enjoined. Third, the appellants implored the Court to order the next election of members of the General Assembly from the state at large. Fourth, as an alternative to an election at large, the appellants proposed that the Court order the appellees to hold an election under the constitutional formula using the 1950 or 1960 official Federal Census figures to apportion the state's qualified voters.

In their brief the appellants appear to have renounced the foregoing and they now have in mind ". . . practical considerations" and their new approach ". . . does not involve an assumption by the District Court of legislative duties or responsibilities". Apparently the appellants now realize that the relief which was prayed in the complaint involves an assumption by the District Court of legislative duties and responsibilities. Perhaps the appellants would also admit that the obstacles pointed out by the District Court and the Supreme Court of Tennessee are real whether they be denominated as "practical" or "legal" in nature. In any event, the appellants now say it is preferable to take "corrective action" by steps. The import of the proposal is that the case be remanded (a) to vacate the existing order entered by the District

Court; (b) to retain jurisdiction in the lower court, but await the action of the 1963 General Assembly; and (c) if (b) fails, to grant equitable relief by injunction. In the final analysis the appellants suggest relief which ultimately is equitable in nature and which partakes of legislative duties or responsibilities now looked upon by them with disfavor.

Applicable to the foregoing proposed avenues of relief a number of generalizations appear appropriate. The proposed remedies are not feasible or legally possible. Under the prior decisions of this Court such remedies are foreclosed.

The proposal of the appellants that the case be remanded to the District Court without directions is tantamount to requesting the Court to compose the federal judiciary into a supervening federal authority to control the political activities of a sovereign state. The Court should reject a political stratagem which is clearly not a judicial remedy.

If a remedy is needed it lies with the people of the state. They are the reservoir of all sovereign power. A different apportionment statute will be enacted if and when demanded of the Legislature by the body politic.

In addition to the propositions heretofore discussed, a brief statement concerning the step by step determinations which may be involved seems to be pertinent.

At the outset the Court must determine whether the failure to sue indispensable parties is fatal and whether the necessary parties are before the Court so that a decree will have efficacy. If the Court sustains this insistence of the appellees, the District Court should be affirmed without reaching the other issues.

Next, if the issues are found to be justiciable, the Court should resolve the question of whether or not this is a

suit against a sovereign state prohibited by the Eleventh Amendment.

In the unlikely event that the Court rejects the foregoing contentions, an adjudication, whether on the theory of a suit in equity or a declaratory judgment, will require the same basic determinations concerning the subject-matter. This is true because a suit will not lie for a declaratory judgment unless the Court would also have the power to grant equitable relief.

If the rights of the parties are declared, the issues should be decided in favor of the appellees and the judgment of the District Court should be affirmed.

Should it be concluded that the judgment of the District Court should be reversed, this Court must initially consider and resolve some basic principles of state law. This Court, contrary to the implicit holding of the Tennessee Supreme Court in **Kidd v. McCanless**, must hold that the apportionment provisions of the Tennessee Constitution are either self-executing or mandatory. As a matter of fact, both were rejected in **Kidd v. McCanless**, because the opinion is based on the de facto doctrine. If the state court had been of the opinion that the provisions are either self-executing or mandatory, the propositions would be decisive in **Kidd v. McCanless**. The force and effect of the construction of the apportionment provisions of the state constitution should be controlling as propositions of state law on this appeal. **Erie Railroad Co. v. Tompkins**, 304 U. S. 64. If this Court finds that it should not adjudge state law by construing the Tennessee Constitution, or if the Court is of the opinion that it is bound by the implicit doctrine of **Kidd v. McCanless**, the judgment of the District Court should be affirmed.

The next proposition of state law for the Court to resolve is whether or not the 1901 apportionment statute,

as a matter of state law, violates the state constitution. In **Kidd v. McCanless** the state supreme court refused to strike down the statute on the ground of unconstitutionality. Accordingly, this Court should follow the state court and hold that as a matter of state law the 1901 enactment is not unconstitutional and, further, that this Court is bound on state law by the state decision. If this Court finds that the state's highest court has refused to hold that the 1901 state statute violates the state constitution, the decree of the District Court should be affirmed.

If the propositions of state law are decided favorable to the appellants, the Court must then decide the questions of federal law involved. Before the appellants are entitled to relief, this Court must conclude that since the 1901 apportionment statute offends the state constitution, the appellants have been deprived of equal protection of the law, or a federally protected civil right as defined by Congress. Otherwise, the judgment of the District Court must be affirmed.

ARGUMENT.

I.

SINCE THERE ARE NO ADVERSE LEGAL INTERESTS, THERE IS NO JUSTICIABLE ISSUE.

The alleged controversy does not touch the legal relations of parties having adverse legal interests and, therefore, a decree, if entered, would constitute an advisory opinion. This is true because the appellants are without authority to maintain the action, and the appellees, as individual defendants, do not have such adverse legal interests to pose a real and substantial controversy.

A. The Appellants Are Without Authority to Maintain the Action.

The individual appellants describe themselves in the complaint as "qualified voters" and insist that their voting rights are being diluted and that their votes are debased (R. 3). They bring the action on their own behalf **and on behalf of all other voters in the State of Tennessee** (R. 4). This allegation implicitly admits that the interest of the appellants are the same as all other citizens in Tennessee. They have no interests which are not shared by other voters.

The appellants thus designate themselves by the use of abstract and theoretical legal phrases and seek to bring themselves under the protection of the Fourteenth Amendment.

Actually, the substance of the complaint is disproportionate legislative representation, denying the appellants a republican form of government. The appellants are asking this Court to take action which will result in the

remapping of the State of Tennessee. The objective is not the correction of a private wrong. The real objective is to induce action which will result in greater representation of the Tennessee municipalities in the halls of the General Assembly of Tennessee.

The appellants' zeal and their cloak of righteousness conceal neither their true identity nor the real nature of the action. They complain, not of discrimination, but of a wrong suffered by all of the voters of the State of Tennessee. **Colegrove v. Green,** 328 U. S. 549. Indeed, they bring the action for the benefit of all the voters of Tennessee (R. 4).

It is significant that the appellants fail to aver that they have a special interest in the subject matter or that their interest is greater than or different from that of other "qualified voters" in the State of Tennessee.

The proceeding is not, and cannot be, a class action.

The general right of every citizen to require a government according to law does not authorize a private citizen to invoke the jurisdiction of the Federal Courts for the purpose of determining the legality of legislative acts. **Fairchild v. Hughes,** 258 U. S. 126. A citizen is required to show that he has sustained, or is about to sustain, a direct injury. It is not enough to show a mere general interest shared by the public at large. **Ex Parte Albert Levitt,** 302 U. S. 633; **Jared v. Fitzgerald,** 183 Tenn. 682.

If the proceeding is to remedy a direct injury to the appellants themselves, then the injury is not one that is sustained "by all other voters in the State of Tennessee". If the injury is one sustained "by all other voters in the State of Tennessee", then there can be no direct injury to the appellants themselves.

B. The Municipalities, as Intervenors, Are Without Authority to Maintain the Action.

The individual appellants, the original plaintiffs, insist that the thrust of their suit is the violation of their individual voting rights, contrary to the civil rights statutes and the provisions of the Fourteenth Amendment.

The municipalities complain of the alleged unfair tax allocations.

The bald fact is that the individual appellants and the municipalities, which are arms of the State, are by this suit seeking to invoke the power of the Federal judiciary to remap the sovereign State of Tennessee. This doctrine is unsound.

Neither a municipality nor an officer of a municipality may maintain a suit such as this for the benefit of third persons, in this instance the taxpayers of the municipality. It is essential that the interest be of a personal and not of an official nature. **Braxton County Court v. West Virginia, ex rel. Dillon,** 208 U. S. 192; **Massachusetts v. Mellon,** 262 U. S. 447.

If the proceeding is to remedy a direct injury to the individual appellants themselves, then the municipalities cannot assist the individual appellants in maintaining the action. If the municipal intervenors are the parties who have sustained the injury, then the injury is not personal and direct and the individual appellants cannot maintain the action.

C. The Appellees Do Not Have Such Adverse Legal Interests to Pose a Real and Substantial Controversy.

The appellees are the Secretary of State, the Attorney General, the Coordinator of Elections, and the members of the State Board of Elections.

The appellees are sued in their capacities as officers of the State of Tennessee. Thus, the suit is actually an action against the State of Tennessee and is barred under the doctrine of sovereign immunity.

If the Court finds that the action is not brought against the appellees in their capacities as officers of the State of Tennessee but against the appellees individually then the appellants cannot contend that the appellees are acting under color of the state statutes.

Actually, the appellees do not call or hold the elections for members of the Legislature. This subject is fully treated in Appendix A.

The elections are held by the county commissioners of elections in each of the ninety-five counties, and such commissioners are not parties to this suit. The county commissioners of elections are appointed by the State Board of Elections, but the latter has no control over them.

The Attorney General, the Coordinator of Elections, and the members of the State Board of Elections have no duties whatsoever in connection with holding elections for members of the Legislature. The Secretary of State has only minor duties in connection with the preparation of absentee ballots and the custody of poll books **after the elections and after certificates of election have been issued.**

If it is intended to bind the county commissioners of elections, the clerks, and judges of elections, the suit is barred, first, because it is an attempt to bind the State of Tennessee in violation of the doctrine of sovereign immunity and, second, because the officials sought to be bound are not before the court or represented in the case.

It is a well established principle that there can be no controversy and, thus no justiciable issue, in a case involv-

ing the holding of elections unless there are parties with adverse legal interests. **Smith v. Blackwell**, 115 F. 2d 186.

Although the appellants pray for an injunction against the enforcement of the apportionment statutes, the issues cannot be justiciable because the appellees have no duties to perform and consequently have not threatened to enforce the statutes.

If it is not intended to bind the county commissioners of elections, the clerks, and judges of elections, then a decree would settle nothing and would be purely advisory. Thus, there could be no controversy.

II.

THE DOCTRINE OF SOVEREIGN IMMUNITY INHIBITS A SUIT AGAINST THE STATE OF TENNESSEE.

This suit against the Secretary of State, the Attorney General, the Coordinator of Elections, and the members of the State Board of Elections is a suit against the State of Tennessee.

The immunity doctrine is strictly applied in Tennessee. **Petty v. Tennessee-Missouri Bridge Commission**, 359 U. S. 275.

Under Article I, Section 17, Constitution of Tennessee, suits may be brought against the State only in such manner and in such courts as the Legislature may by law direct. Appendix B. The Legislature has not authorized suits against the State of Tennessee in the District Courts of the United States. Section 20-1702, Tennessee Code Annotated, Appendix B.

This Court has held that a suit against a public official of the United States in his official capacity is a suit against the United States. **Becker Steel Co. v. Cummings,**

296 U. S. 74, 78; **Cummings v. Deutsche Bank**, 300 U. S. 115, 118.

The same rule applies to suits against officials of the State of Tennessee. **Peerless Const. Co. v. Bass**, 158 Tenn. 518.

A state cannot be sued without its consent in a District Court of the United States by one of its own citizens. This is true even though the citizen alleges that the case arises under the Constitution or laws of the United States. **Hans v. Louisiana**, 134 U. S. 1, 17-18; **Ex Parte Young**, 209 U. S. 123, 150.

This Court has held that a suit to compel the officials of a state to refund taxes alleged to have been unconstitutionally collected was a suit against the state. **Ford Motor Company v. Department of Treasury of Indiana**, 323 U. S. 459.

In praying for relief against the appellee officials of the State of Tennessee, the appellants confuse the well settled rule that public officials can be **prohibited** from performing unconstitutional acts with the equally well settled rule that suits to **coerce** the acts of state officials are suits against the sovereign. (See **Governor of Georgia v. Madrago**, 26 U. S. 110; **New York Guaranty Company v. Steele**, 134 U. S. 230; **Cunningham v. Macon & Brunswick Railroad Company**, 109 U. S. 446.)

Are the appellants seeking to bind the officers of the State of Tennessee by decree of this Court? Or do the appellants seek a declaration which would **not** be binding upon the officers of the State of Tennessee?

If the appellants are seeking to bind the officers of the State of Tennessee by judicial pronouncement, then the suit is one to compel the appellees to perform an alleged official duty and the judgment, if rendered, would be co-

ercive, since it is intended to obtain legislative redress indirectly through the appellees.

If the appellants seek a declaration which would not be binding upon the officers of the State of Tennessee, the suit presents no "case or controversy" because the parties to be bound are not before the Court and because a decree, if rendered, would be a nullity.

In **Giles v. Harris,** 189 U. S. 475, Mr. Justice Holmes recognized this dilemma, and said:

> "The Circuit Court has no constitutional power to control its action by any direct means. . . . Unless we are prepared to supervise the voting in the State . . . it seems to us that all that the plaintiff could get from equity would be an empty form." 189 U. S. 488.

Thus, it is apparent that this is either an attempt to bind the purported election officials of the State of Tennessee, and thus the State of Tennessee itself, by judicial fiat, in which event this Court lacks jurisdiction because of the State's immunity to suit, or it is not an attempt to bind such officials, in which event the proceeding presents no "case or controversy".

III.

SINCE THE CASE INVOLVES ONLY PECULIARLY POLITICAL ISSUES, THE DISTRICT COURT WAS WITHOUT JURISDICTION TO ENTERTAIN THE ACTION.

A. The Issues Are Wholly Political.

This Court has said that in determining whether a question is political and therefore not justiciable, the Court will consider

> "the appropriateness under our system of government of attributing finality to the action of the political departments and also the lack of satisfactory criteria for a judicial determination. . . ." **Coleman v. Miller,** 307 U. S. 433, 454-455.

Whether a question is political is to be determined not merely by abstract theory but by practical considerations.

The appellants, in Section XIV of the complaint, summarize their grievances as follows:

> ". . . that when all inequalities are taken together, the violations of the particular constitutional provisions set out above and as shown in Exhibits 'C' and 'D' **result in a distortion of the constitutional system as established, defined, and guaranteed** by the Constitution of the State of Tennessee and the Fourteenth Amendment to the Constitution of the United States; **that this distortion of our system** of electing representatives to the **General Assembly prevents it as it is now composed, from being a body representative of the people of the State of Tennessee** . . ."
>
> ". . . and that thus a minority now rules in Tennessee by virtue of its control of both Houses of the General Assembly, **contrary to the basic principle of representative government.** . . ." (Emphasis supplied) (R. 12, 13).

The appellants then pray for a declaration as to their rights and specifically ask the Court:

> (1) To restrain the appellees from holding an election for members of the Tennessee Legislature under the present apportionment laws, and
>
> (2) To direct the appellees to hold the next election for members of the Tennessee Legislature "on an at-large basis" (R. 19, 20).

Thus, the appellants, in the guise of citizens denied the right to vote, ask the Court to enforce the republican form of government in the State of Tennessee.

This Court has always held that the enforcement of the guaranty of a republican form of government is not a question properly falling within its jurisdiction. **Luther v. Borden,** 48 U. S. 1; **Pacific States Teleph. & Teleg. Co. v. Oregon,** 223 U. S. 118; **Ohio Ex Rel. Bryant v. Akron Metrop. Pk. Dist.,** 281 U. S. 74.

B. **Under the Constitution of Tennessee, Reapportionment Is a Question Solely for the Legislature.**

The Constitution of Tennessee specifically provides for three distinct divisions of the state government and prohibits the officers belonging to one division from exercising the powers belonging to another division.

The government consists of the legislative department, the executive department, and the judicial department. Article II, Section 1, Constitution of Tennessee, Appendix C. The legislative power is vested in a General Assembly consisting of two houses. Article II, Section 3. The executive power is vested in a governor. Article III, Section 1. The judicial power is vested in a supreme court and in such inferior courts as the Legislature may establish. Article VI, Section 1, Appendix D.

The Constitution of Tennessee specifically prohibits the officers in one division of the state government from exercising powers conferred on the other divisions. Article II, Section 2, Constitution of Tennessee, Appendix C.

The Supreme Court of Tennessee has held that it is essential to the maintenance of a republican form of government that the actions of the three departments be kept separate and distinct. **Richardson v. Young,** 122 Tenn. 471, 492-493.

Reapportionment must be made by the Legislature through the enactment of appropriate legislation. There is no provision in the Constitution of Tennessee or the statutes of Tennessee for the apportionment to be made by a board or commission. The matter is purely legislative.

The apportionment must be based, not on population, but on an enumeration of the qualified voters. Article II, Section 4, Constitution of Tennessee, Appendix C. The enumeration of the qualified voters necessarily entails the determination of the number of qualified voters in the assembly districts. The enumeration can only be authorized by, and conducted under the supervision of, the Legislature.

That the matter is purely legislative was recognized and emphasized by the District Court when it said:

> "The Constitution of the state vests the duty of making the enumeration in the legislature and not in the courts. Moreover, the redistricting of the state is required to be based upon an enumeration of the qualified voters and not upon population alone. The Court would have no way of knowing the number of qualified voters in the various districts. **Such a remedy would constitute the clearest kind of judicial legislation and an unwarranted intrusion into the political affairs of the state.**" (Emphasis supplied) (R. 218-219.)

Thus, the entire subject is legislative and peculiarly political.

C. Equity Is Without Power to Act, by Injunction or Declaratory Judgment, in Purely Political Matters.

By insisting that the Court is not barred from considering the question merely because it relates to political rights, the appellants wholly misconceive the issue.

The controlling question is not whether the Court will enforce an ordinary political or civil right. The decisive question is whether the Court will enforce the guaranty of a republican form of government in the State of Tennessee. This is a political right unique in nature.

The rule that equity will not interfere with state elections or intervene in purely political matters is fundamental.

In **Guaranty Trust Company of New York v. York**, 326 U. S. 99, the Court said:

> "Equitable relief in a federal court is, of course, subject to restrictions: the suit must be within the traditional scope of equity as historically evolved in the English Court of Chancery." 326 U. S. 105.

Certainly the appellants would not seriously contend that a question such as the remapping of the State of Tennessee was within the traditional scope of the English Court of Chancery. Fuller-Weston, Political Questions, 38 **Harvard L. Rev.** 296, 302-304.

The rule applies even though the suit is brought under the Civil Rights Act. In **Giles v. Harris**, 189 U. S. 475, Mr. Justice Holmes said:

> "It seems to us impossible to grant the equitable relief which is asked. It will be observed in the first place that the language of sec. 1979 does not extend the sphere of equitable jurisdiction in respect of what shall be held an appropriate subject matter for that kind of relief. The words are 'shall be liable to the party injured in the action at law, suit in equity, or other proper proceeding for redress.' They allowed a suit in equity only when that is the proper proceeding for redress, and they refer to existing standards to determine what is a proper proceeding. The traditional limits of proceedings in equity have not em-

braced a remedy for political wrongs. **Green v. Mills**, 69 Fed. Rep. 852." 189 U. S. 486.

The doctrine was fully considered in **Colegrove v. Green**, 328 U. S. 549.

In **South v. Peters**, 339 U. S. 276, the Court said:

". . . Federal Courts consistently refuse to exercise their equity powers in cases posing political issues arising from a state's geographical distribution of electoral strength among its political subdivisions." 339 U. S. 277.

Of the five principal cases relied upon by the appellants to support jurisdiction of the subject matter, not one involves the power or jurisdiction of the Court to reapportion legislative seats or to enjoin the holding of an election. Each case was concerned with an entirely different question.

In **Nixon v. Herndon**, 273 U. S. 536; **Nixon v. Condon**, 286 U. S. 73, and **Smith v. Allright**, 321 U. S. 649, the actions were brought against election officials to recover damages for refusing to let the plaintiffs vote. In **Snowden v. Hughes**, 321 U. S. 1, the action was likewise one for damages but based on the plaintiff's alleged right to have his name placed on the ballot. **Terry v. Adams**, 345 U. S. 461, involved the right to vote in a party primary.

In each of these cases the Court was concerned with political rights but not with the peculiar political right to enjoy a republican form of government under Article IV, Section 4, Constitution of the United States.

D. The Declaratory Judgment Act Does Not Enlarge the District Court's Jurisdiction.

The provisions of the Declaratory Judgment Act do not enlarge the scope of Federal jurisdiction in election matters.

In **Aetna Life Insurance Company v. Haworth**, 300 U. S. 227, the Court held that the operation of the Act is procedural only and that it did not and could not declare a matter to be a "case" or "controversy" within the constitutional limitations on jurisdiction.

Where the subject matter is such that equity cannot protect the rights of the plaintiff by injunction because of a lack of jurisdiction, the Court is without jurisdiction to enter a declaratory judgment. **Great Lakes Company v. Huffman**, 319 U. S. 293; **Mine Safety Appliances Co. v. Forrestal**, 326 U. S. 371.

In **Colegrove v. Green**, 328 U. S. 549, the Court said that "the test for determining whether a federal court has authority to make a declaration such as is here asked, is whether the controversy 'would be justiciable in this Court if presented in a suit for injunction.' "

The principles of American jurisprudence have never contemplated that jurisdiction at law or in equity extends to elections and the supervising of elections. Although it is true that many state courts are empowered to hear election contests, it is likewise true that the judges who hear such cases are themselves subject to election. But the entire concept of federal constitutional jurisprudence rejects the principle that the Federal judiciary, independent of elections, should supervise the holding of elections. Since the Federal judiciary is independent of elections, elections must remain independent of the Federal judiciary. It was not by accident that this Court, in **Colegrove v. Green**, said that "It is hostile to a democratic system to involve the judiciary in the politics of the people."

IV.

THE ALLEGED CONTROVERSY DOES NOT INVOLVE RIGHTS PROTECTED UNDER EITHER THE FOURTEENTH AMENDMENT OR THE CIVIL RIGHTS STATUTES.

Although the appellants' complaint alleges discrimination, contrary to the provisions of the Fourteenth Amendment and the civil rights statutes, because of dilution of their votes, the gravamen of their complaint is the denial of the republican form of government.

Disproportionate legislative representation is not discrimination.

A. The Fourteenth Amendment Does Not Guarantee Equality of Voting Strength.

The appellants base their right to relief on the alleged dilution by the State of their **right to vote** and **the right to have their votes accorded equal weight with those of all other voters.** The violation of these rights, they say, is a violation of the provisions of the Fourteenth Amendment.

They do not assert that they have been denied the right to vote as was the case in **Nixon v. Herndon,** 273 U. S. 536; **Nixon v. Condon,** 286 U. S. 73; **Smith v. Allright,** 321 U. S. 649; and **Terry v. Adams,** 345 U. S. 461. Nor do they aver that their ballots were altered or that forged ballots have been placed in the ballot boxes, as in **United States v. Classic,** 313 U. S. 299, and **United States v. Saylor,** 322 U. S. 385.

The appellants have confused the present issue with the questions determined in the above cases. Consequently, the appellants have incorrectly charged a denial of their right to vote and the right to have their votes counted.

In contending that a federal right is involved, the appellants fail, indeed they refuse, to distinguish between the source of the privilege of voting for **members of the Legislature** and the privilege of voting for **members of Congress.** These are two distinct privileges, or rights, and are derived from different sources.

The right to vote for members of the Legislature is derived from the State of Tennessee.

In **Breedlove v. Suttles,** 302 U. S. 277, the Court said:

> "Privilege of voting is not derived from the United States, but is conferred by the State and, save as restrained by the Fifteenth and Nineteenth Amendments and other provisions of the Federal Constitution, the State may condition suffrage as it deems appropriate." 302 U. S. 283.

This principle is not here in question. The appellants, on pages 12 and 13 of their jurisdictional statement, concede that the Constitution of the United States ". . . does not give rise to the individual citizen's right to vote, since this franchise springs from the individual states themselves."

On the other hand, the right to vote for **members of Congress** is derived from Article I, Section 2, Constitution of the United States. **Ex Parte Yarbrough,** 110 U. S. 651; **United States v. Classic,** 313 U. S. 299.

Thus, the right to vote for members of the Legislature and the right to vote for members of Congress are derived from different sources. This principle is incontrovertible.

Despite this clear distinction, the appellants assert that the dilution in strength of their votes for members of the state legislature is an infringement of their constitutional right to vote.

The cases in which this Court has said that the right to have one's vote counted is equivalent to the right to vote have been cases in which the appellants were actually denied their franchise in elections for members of Congress. **United States v. Classic**, 313 U. S. 299; **United States v. Saylor**, 322 U. S. 385.

The holdings in these cases do not rest on the Fourteenth Amendment, but on Article I, Section 2, Constitution of the United States. To the contrary the appellants assume what this Court has never held: that the right to vote for a member of the Legislature is a right protected by the Fourteenth Amendment. The appellants undertake to reach this position by assuming that because the failure to have one's vote counted in a Congressional election constitutes a violation of the Constitution of the United States, it necessarily follows that if one's vote is diluted, in an election for members of the Legislature, because of a violation of a state law or of a state constitution, this in itself constitutes a violation of the Fourteenth Amendment.

The fallacy of this premise is apparent. An act contrary to state law is not in itself a violation of the Federal Constitution. An act in violation of state law is not in violation of the Fourteenth Amendment unless it would be a violation of the Fourteenth Amendment in the absence of the statute.

In **Owensboro Waterworks Co. v. Owensboro**, 200 U. S. 38, the Court said:

> "The Fourteenth Amendment was not intended to bring within Federal control everything done by the state or by its instrumentalities that is simply illegal under the state laws, but only such acts by the states or their instrumentalities as are violative of rights secured by the Constitution of the United States." 200 U. S. 47.

If it is assumed that the appellants' votes are diluted, it does not follow that their rights under the Fourteenth Amendment have been infringed. Indeed, this Court has held that such rights are not infringed.

In **United States v. Classic**, 313 U. S. 299, the Court said:

> ". . . The right to become a candidate for state office, **like the right to vote for state officers, Minor v. Happersett**, 21 Wall. (U. S.) 162, 170-178, 22 L. Ed. 627, 629-631; **Pope v. Williams**, 193 U. S. 621, 632, 48 L. Ed. 817, 822, 24 S. Ct. 573; **Breedlove v. Suttles**, 302 U. S. 277, 283, 82 L. Ed. 252, 256, 58 S. Ct. 205, is a right or privilege of state citizenship, not of a national citizenship which alone is protected by the privilege and immunities clause." (Emphasis supplied.) 321 U. S. 6, 7.

Thus, the right to vote for members of the General Assembly of the State of Tennessee and the weight to be accorded that vote is purely a state right. The Fourteenth Amendment does not protect such right.

The appellants, having falsely assumed that a federal right is being violated, ask the Court for relief. In so doing they ask the Court to exercise its equity powers to protect a state right in a type of case in which the Court has said it would not exercise such powers to protect a federal right. **Colegrove v. Green**, 328 U. S. 549.

What standard is the Court to use in determining when discrimination exists and when it does not exist?

In **Wood v. Broom**, 287 U. S. 1, the Court held that in the absence of a requirement embodied in an act of Congress, it is not necessary that Congressional districts be composed of an equal number of inhabitants. As to Congressional districts, there is no requirement for equality of representation.

It is a fact that Congress has likewise failed to provide any standards for equality of representation in state legislatures. If Congress must set the requirements for equality of representation in Congressional districts, there is even greater reason for this Court holding that Congress must provide standards for equality of representation in legislative districts.

The determination that discrimination exists necessarily involves a finding that the constitutional requirements have not been met. By what standards are those requirements to be determined and who is to set the standard? It is no answer to say, as the appellants suggest, that the Court may find that discrimination exists without first determining what constitutes discrimination. In other words, the appellants ask the Court to pre-empt the powers of Congress and to legislate by fixing the standard.

B. **The Allegation of Discrimination Is Unfounded.**

The appellants' contention that there is a purposeful and systematic plan to discriminate against a class of persons is no more than a legal conclusion. Actually, the nub of their complaint is that because of the passage of time and increases and shifts in population, the General Assembly of Tennessee is not a representative body (R. 12, 13).

In bringing the suit on behalf of all voters in the State of Tennessee, the appellants admit that there is no particular class against whom discrimination is being practiced (R. 4).

As to the right to vote, the case is free of any purposeful discrimination against a class or individuals.

Discrimination is not, and cannot be, presumed. The element of purposeful or intentional discrimination must be shown. **Snowden v. Hughes**, 321 U. S. 1, 8.

This Court has refused to hold that the result of shifts in population and the passage of time amount to a dilution of voting rights sufficient to show intentional and purposeful discrimination under the provisions of the Fourteenth Amendment or the civil rights statutes. **Colegrove v. Green**, 328 U. S. 549; **Remmey v. Smith**, 342 U. S. 916; **Anderson v. Jordan**, 343 U. S. 912; **Kidd v. McCanless**, 352 U. S. 920; **Radford v. Gary**, 352 U. S. 991.

The appellants assert, on the one hand, that the alleged discrimination consists in denying them the right to vote and in failing to give proper weight to their ballots. They say, on the other hand, that the alleged discrimination goes, not to the question of voting, but to the question of the allocation of the burdens of taxation and the "unjust and unequal distribution" of tax funds (R. 16-18).

What is the discrimination? Is it the denial of the right to vote? Or is it the unequal distribution of tax funds?

If the alleged discrimination relates to the subject of taxation, it must involve either the allocation of the burdens of taxation or the distribution of tax funds. In either event, there is not, and cannot be, discrimination.

It is significant that the allegations in the complaint fail to claim discrimination relative to the allocations of the burdens of taxation. Whatever the tax may be—gasoline tax, sales and use taxes, alcoholic beverage taxes, income taxes, beer taxes—there is no discrimination in the levying and collecting of it. All of the mentioned taxes are imposed in the same manner upon the voters and citizens in the large cities, the small villages, and the rural areas.

The citizen in Memphis, the state's largest city, pays the same gasoline tax, the same sales and use taxes, the same alcoholic beverage taxes, the same income taxes and

the same beer taxes, as the citizens in the state's least populous county. There is no difference whatsoever.

If the citizens of Shelby County, Davidson County, Hamilton County, and Knox County, the state's four most populous counties, pay more taxes than the citizens in a smaller county, it is because there are more citizens in the larger counties than in the smaller county. It is certainly not because the state tax rate is greater or the method of collection is different. Citizens pay their taxes as individuals and not as residents of a particular city or county.

Thus, there is no showing of discrimination of any kind in the levying and collecting of state taxes. The appellants do not even allege or charge that the so-called discrimination violates any right protected under the Constitution of Tennessee or the Constitution of the United States.

It is likewise true that there is no "unjust and unequal distribution" of tax funds. The appellants do not charge that the way and manner in which tax funds are distributed violates any constitutional provision.

This Court has held that a taxpayer cannot complain that a tax is discriminatory on the ground that it returns less to his town or county than he and the other inhabitants of the town or county pay. **Dane v. Jackson,** 256 U. S. 589; **N. C. & St. L. R. Co. v. Wallace,** 288 U. S. 249; **Carmichael v. Southern Coal & Coke Co.,** 300 U. S. 644. Mathematical equality in distribution has never been required.

It must be remembered that a state, composed of counties, is a governmental unit just as is the United States, which is composed of the several states. A tax collected by the State of Tennessee is used for the operation of the state government in the same manner a tax collected by the United States is used for the operation of the federal government.

It follows that tax funds used to construct and maintain a highway running from Bristol in northeastern Tennessee to Memphis in southwestern Tennessee, is for the use and benefit of all the citizens of Tennessee. In the same manner, tax funds collected by the United States from citizens of Maine or Oregon may be expended for governmental purposes in Illinois or New Mexico.

The same principle applies, and must apply, to the distribution of school funds. Contrary to the contention of the appellants, a child attending a two-room school in a rural area is as much entitled to the educational benefits afforded by the state government as is the student in one of Tennessee's larger cities. In each instance, the child is a future citizen, not alone of the county or city in which he resides, but of the State of Tennessee. The very purpose of government is to promote the welfare of its citizens.

How, then, can it be said that there is any discrimination in the distribution of tax funds?

To contend that the General Assembly of Tennessee, if constituted in a different manner, would distribute the state tax funds on a different basis, is purely speculative. The entire question of the collection and distribution of taxes is a governmental matter and thus peculiarly political.

The alleged discrimination is without foundation in law or fact.

C. The Civil Rights Act Amendments of 1957 Are Not Applicable to This Case.

The appellants initially insisted that they were entitled to relief under the provisions of the 1957 Amendment to the Civil Rights Act. Public Law 85-315, Part III, Sec. 121, 71 Stat. 637. The amendment simply states,

> "To recover damages or to secure equitable or other relief under any act of Congress providing for the protection of civil rights, including the right to vote."

The intent of the Congressional amendment was fully discussed on pages 9 to 13 of the appellees' "Statement In Opposition To Appellants' Statement of Jurisdiction and Motion To Dismiss".

Since the gravamen of the complaint is the lack of a republican form of government in the State of Tennessee, and since the action is brought on behalf of all of the voters of Tennessee, the civil rights laws can have no application (R. 12-13, 4). Moreover, if the alleged discrimination relates to the collection and distribution of tax funds, it does not involve "the right to vote" (R. 16-18).

This Court has never treated complaints about state reapportionment as falling within the orbit of civil rights. Indeed, to interpolate into the provisions of the civil rights laws the question of unequal apportionment, "would be legislative action by judicial pronouncement". **Remmey v. Smith,** 102 F. Supp. 708, 712, appeal dismissed, 342 U. S. 916.

Actually, the appellants, on page 7 of their "Reply to Appellees' Statement in Opposition and Motion to Dismiss", concede:

> "The injured voters are not urging the creation of any new rights. . . ."

If the appellants now concede that they are not claiming any new rights under the 1957 amendment to the Civil Rights Act, then the amendment, under the appellants' own admission, has no bearing on the question.

Therefore, the appellees urge that the appellants have failed to show discrimination under either the equal protection clause or the civil rights statutes.

V.

THE NEED FOR JUDICIAL ABSTENTION IS STRONGER HERE THAN IN CONGRESSIONAL REDISTRICTING CASES.

This Court has held in numerous cases that suits such as the present one cannot be maintained, that issues relating to the apportionment of members of state legislatures do not present substantial federal questions, and that the type of relief here prayed cannot be granted.

A. Colegrove v. Green Determined the Issues Adversely to the Appellants' Contentions.

In **Colegrove v. Green,** 328 U. S. 549, the question of the exercise of the equity powers of the Federal judiciary to correct an improper apportionment of the **Congressional districts** of Illinois was squarely presented.

When contrasted with the present case, **Colegrove v. Green,** alleged a dilution of voting rights derived from the Constitution of the United States, and not the Constitution of Illinois, since the right related to the election of members of Congress instead of members of the Illinois Legislature.

There, as here, the Illinois Legislature had failed to enact new apportionment legislation and shifts in population, with the passage of time, had resulted in unequal representation in Congress.

This Court refused to grant relief in the Colegrove case even though it involved the right to vote for members of Congress, a right derived from the Constitution of the United States.

The Court held that the issues presented were not only political but that they were "peculiarly political"; that

the wrong suffered was not a private wrong, but a wrong suffered by Illinois as a state; that the question was a question for the Legislature of Illinois and not for the Supreme Court of the United States; that since the issues were peculiarly political, it would be improper under our republican form of government for the Court to involve itself in politics; that our system of constitutional government precludes the intervention of the judiciary in such disputes; that a remedy exists and that the remedy is political in nature, namely, the election of legislatures that will enact apportionment legislation.

In his concurring opinion Mr. Justice Rutledge emphasized the question of the delicacy of federal-state relations and the grave consequences that could flow from the interference by the Supreme Court of the United States with the functions and duties of the legislature of one of the sovereign states of the Union.

In the dissenting opinion, Mr. Justice Black predicates his insistence that relief should be granted on the principle that **the right to vote for members of Congress** is a federal right since it is derived from Article I, Section 2, Constitution of the United States.

Thus, even the dissenting opinion recognized that if a federal right could be involved, it was because the case pertained to election of **members of Congress**, and that the right to vote for **members of Congress** is derived from Article I, Section 2, Constitution of the United States.

B. The Court Has Consistently Abstained From Reviewing State Legislative Apportionment Cases.

If the Court will not exercise its equity jurisdiction in a case involving the redistricting of a state for the purpose of electing members of Congress, there is even less reason

for the Court to grant relief in a case involving the apportionment of members of a state legislature.

That is precisely the position to which this Court has consistently adhered.

In **Turman v. Duckworth,** 329 U. S. 675, and **Cook v. Fortson,** 329 U. S. 675, the question presented was whether the county unit system of voting in Georgia deprived the plaintiffs of the equal protection of the laws. This Court ordered the District Court to dismiss the bill in each case.

Subsequently, the Court, in **MacDougall v. Green,** 335 U. S. 281, refused to exercise its jurisdiction where an Illinois statute required a qualifying petition for a candidate for a new political party to be signed by 25,000 qualified voters, including 200 qualified voters from 50 counties. The Court referred to **Colegrove v. Green,** supra, and held that the statute was not in violation of the Fourteenth Amendment.

Georgia's county unit system of voting was again challenged in **South v. Peters,** 339 U. S. 276. This Court affirmed the District Court's action in dismissing the petition and said:

> ". . . Federal Courts consistently refuse to exercise their equity powers in cases posing political issues arising from a state's geographical distribution of electoral ~~strength among~~ its political subdivisions." 339 U. S. 277.

In **Cox v. Peters,** 342 U. S. 936, another assault was made upon Georgia's county unit laws, and it was insisted by the petitioner that his vote had not received its full value in violation of the equal protection clause of the Fourteenth Amendment. The motion to dismiss was granted for want of a substantial federal question.

In **Remmey v. Smith,** 342 U. S. 916, the District Court had refused to enjoin the enforcement of the Pennsylvania

apportionment laws, and had rejected the insistence that those laws violated the due process and equal protection clauses. This Court granted the motion to dismiss the appeal on the ground that it presented no substantial federal question.

The question of the geographical distribution of electoral strength was next before this Court in **Anderson v. Jordan,** 343 U. S. 912, on an attempted appeal from the decision of the Supreme Court of California. The appeal was dismissed on the authority of **Colegrove v. Green,** supra; **MacDougall v. Green,** supra; and **Wood v. Broom,** 287 U. S. 1.

In **Kidd v. McCanless,** 352 U. S. 920, the appeal involved the identical apportionment statutes now before the Court. The appeal was dismissed on the authority of **Colegrove v. Green,** supra, and **Anderson v. Jordan,** supra.

This Court affirmed the District Court's dismissal of the action in **Radford v. Gary,** 352 U. S. 991, where it was contended that the Oklahoma apportionment laws were in violation of the Constitution of the United States. The Court cited **Colegrove v. Green,** supra, and **Kidd v. McCanless,** supra.

The Court likewise refused to consider the question of geographical distribution of electoral strength in **Hartsfield v. Sloan,** 357 U. S. 916. The Court was of the opinion that the motion for leave to file a petition for writ of mandamus to compel the District Judge to assemble a three-judge court to pass on the validity of the Georgia county unit law should be denied.

In **Remmey v. Smith, Kidd v. McCanless,** and **Radford v. Gary,** the issues were the same as in the present case. In each instance it was insisted that the failure of the legislature to enact reapportionment legislation impaired the plaintiffs' voting rights, and that such impairment

was an infringement of the plaintiffs' rights under the Fourteenth Amendment and the federal statutes. In each instance the Court rejected such contentions.

Indeed, as to **Kidd v. McCanless**, the District Court has held that the issues in the present case are identical with the issues in the Kidd case (R. 216).

In rejecting the appeal in **Kidd v. McCanless**, the Court cited **Colegrove v. Green.**

In affirming the judgment of the three-judge District Court in dismissing the complaint in **Radford v. Gary**, the Court cited **Kidd v. McCanless** along with **Colegrove v. Green.**

Can it be seriously contended that this Court has not reached the issues presented by the present appeal? Has not the Court said that such actions cannot be maintained? Has not the Court held that issues relating to the apportionment of members of state legislatures do not present substantial federal questions? Has not the Court ruled that the type of relief here prayed cannot be granted? It is respectfully submitted that the Court has not acted erroneously in deciding the foregoing cases.

Wherein do the issues now presented differ from those previously presented?

The appellants assert that this case presents issues relating to individual rights. Were the "rights" any the less "individual" in the cases arising in California, Georgia, Pennsylvania, and Oklahoma? The individual rights asserted in **Kidd v. McCanless** are the same individual rights urged in the present case, and the District Court so held.

The appellants contend that in this case it can be shown that the failure of the Legislature to enact new apportion-

ment legislation is deliberate. If the failure to enact such legislation is deliberate, then the same situation existed in **Remmey v. Smith, Kidd v. McCanless,** and **Radford v. Gary.** This assertion by the appellants is no more than the statement of a legal conclusion.

The appellants assert that in this case there is a "declared constitutional policy" relative to the apportionment. The same was true in **Remmey v. Smith.** Article II, Section 18, Constitution of Pennsylvania. The same was true in **Anderson v. Jordan.** Article IV, Section 6, Constitution of California. The same was true in **Radford v. Gary.** Article V, Sections 9 (a) and 10, Constitution of Oklahoma. The same provisions of the Constitution of Tennessee which were before the Court in **Kidd v. McCanless** are before the Court in the present case.

The issues here presented have been before this Court on numerous occasions and have been determined adversely to the appellants' contentions.

The District Court was correct in finding that the issues in the present case are the same as those previously presented to this Court (R. 216-217).

When the appellants insist that this case presents issues not yet passed upon by this Court, they wholly misconceive the issues.

If the circumstances in **Colegrove v. Green,** involving the election of **members of Congress,** did not present a case where relief could be granted, then the present case, involving the election of **members of a state legislature,** cannot present a case where relief can be granted.

VI.

THE EXERCISE OF THE COURT'S EQUITY POWERS WOULD SERIOUSLY DISRUPT, IF NOT DESTROY, THE GOVERNMENT OF THE STATE OF TENNESSEE.

A declaration by this Court that Tennessee's apportionment laws are unconstitutional would seriously disrupt, if not destroy, the government of the State of Tennessee.

That the effect of such a declaration must be carefully considered was recognized both by the District Judge and the three-judge District Court (R. 93-94, 217).

In **Kidd v. McCanless,** 200 Tenn. 273, certiorari denied, 352 U. S. 920, the identical apportionment statutes and the identical state of facts with respect to apportionment of legislative seats in Tennessee were considered by this Court. The three-judge District Court found such to be true and specifically so held (R. 216).

The Supreme Court of Tennessee, in the Kidd case said:

> "The ultimate result of holding this Act unconstitutional by reason of the lapse of time would be to deprive us of the present Legislature and the means of electing a new one and ultimately bring about the destruction of the State itself." 200 Tenn. 282 (R. 65).
>
> "It seems obvious and we therefore hold that if the Act of 1901 is to be declared unconstitutional, then the de facto doctrine cannot be applied to maintain the present members of the General Assembly in office. If the Chancellor is correct in holding that this statute has expired by the passage of the decade following its enactment then for the same reason all prior apportionment acts have expired by a like lapse of time and are non-existent. Therefore we would not only not have any existing members of the General As-

> sembly but we would have no apportionment act whatever under which a new election could be held for the election of members to the General Assembly." 200 Tenn. 281 (R. 65).

That this Court would decree the present apportionment laws to be unconstitutional is unthinkable.

If the State of Tennessee is denied a legislature, or is denied a legislature elected according to the provisions of the Constitution of Tennessee, the State cannot issue bonds; cannot lawfully collect taxes; cannot lawfully make expenditures for the operation of the schools and other governmental purposes; and cannot operate its courts, prisons, and other institutions.

In **Luther v. Borden**, 7 How. 1, this Court said that if it held a state government to be operating unconstitutionally, it would result in the holding that:

> ". . . the laws passed by its Legislature during that time were nullities; its taxes wrongfully collected; its salaries and compensation to its officers illegally paid; its public accounts improperly settled; and the judgments and sentences of its courts in civil and criminal cases null and void, and the officers who carried their decisions into operation answerable as trespassers, if not in some cases as criminals."

These serious consequences at the outset were glibly thrust aside by the appellants but are now minimized by a feeble attempt at rationalization.

The appellants assert **that in their view** this Court need not accept the holding of the Supreme Court of Tennessee that the invalidation of the present apportionment laws would prevent the Legislature from functioning in a de facto capacity to enact new apportionment legislation.

In sharp contrast to the appellants' view, this Court, in a Tennessee case, has held that it would and should

accept the holding of the Supreme Court of Tennessee relative to de facto bodies. In **Norton v. Shelby County**, 118 U. S. 425, the Court said:

> "No federal court should refuse to accept such decisions as expressing on these subjects the law of the State." 118 U. S. 440.

The implications to be drawn from the Kidd case are far-reaching and lead inescapably to the conclusion that this Court should not attempt to interpret the apportionment provisions of the state constitution. The Supreme Court of Tennessee must have concluded that the provisions are not self-executing. Moreover, the state court did not find that the provisions are mandatory in the sense that the Legislature could be compelled to follow them. If the Supreme Court of Tennessee did not implicitly so conclude, then its decision in the Kidd case could not have been rested upon the de facto doctrine. If the state constitutional provisions are neither self-executing nor mandatory (and only the Supreme Court of Tennessee can decide these propositions) how can it be said that the 1901 apportionment statutes are invalid under any theory, or violate any federally protected right?

This Court has said that "Where a federal court of equity is asked to interfere with the enforcement of state laws, it should do so only 'to prevent irreparable injury which is clear and imminent' ". **American Federation of Labor v. Watson**, 327 U. S. 582, 593. If this is the policy of this Court as to state laws generally, what should the policy of the Court be as to state apportionment laws which affect the very life-blood of the state governments?

The Supreme Court of Tennessee has held that if the present apportionment laws are declared to be unconstitutional,

> ". . . we would not only not have any existing members of the General Assembly but we would have

no apportionment act whatever under which a new election could be held for the members to the General Assembly." 200 Tenn. 281 (R. 65).

Thus, the basic framework of constitutional government in Tennessee would be destroyed. Where such a result may be contemplated, it is inconceivable that the appellants would pursue the matter to the extent of asking this Court to destroy the government of the State of Tennessee.

What more serious question involving a state constitution could there be?

VII.

THE REMEDIES SUGGESTED BY THE APPELLANTS ARE NEITHER FEASIBLE NOR LEGALLY POSSIBLE.

The weakness of the appellants' case is emphasized by their contentions relative to the question of relief. The Court should not be misled by the appellants' chameleon-like approach to the subject.

In the complaint the appellants pray for a declaration as to their rights and specifically ask the Court:

(1) To restrain the appellees from holding an election for members of the Tennessee Legislature under the present apportionment laws, and

(2) To direct the appellees to hold the next election for members of the Tennessee Legislature "on an at-large basis" (R. 19, 20).

Then, in their jurisdictional statement, the appellants suggested two remedies which are somewhat different from the prayers in the complaint. First, they say the Court could enjoin the holding of any future election under the present apportionment laws. Second, they sug-

gest that the Court could find that a violation of appellants' rights have occurred, and consider at a future date the question of relief.

Now, in their brief on the merits, they propose still other and different remedies. They ask for temporary relief. They suggest that this Court remand the case to the District Court with directions to vacate the order of dismissal. They say that the District Court could keep the case on the docket, and then at some indefinite time in the future, that Court "might" issue an injunction or it "might" make a declaration.

None of the suggested remedies is sound.

The appellants cannot successfully disguise the nature of the remedies sought. They ask, as the complaint clearly shows, for an injunction to prevent the holding of an election for members of the Tennessee Legislature, or for an order to require the officials of the State of Tennessee to hold such an election on an "at-large-basis."

To enjoin the holding of any future election for members of the Legislature under the present laws would mean that the State of Tennessee would have no legislature whatsoever.

It is apparent that an election at large would be contrary to the provisions of the Constitution of Tennessee. In **Kidd v. McCanless**, the Supreme Court of Tennessee said:

> "There is no provision of law for election of our General Assembly by an election at large over the State." 200 Tenn. 277.

The District Court held that since the Constitution provides for members of the Legislature to be elected from counties and districts, they obviously cannot be elected at large. The Court said:

"Practical considerations also are heavily weighted against such a remedy. It would lead to serious geographical inequities and other discriminations, probably to a greater extent than those presently existing. It would require the Court not only to provide for the supervision of the entire election but also to devise detailed rules and regulations under which such election should be held, a task which the courts are not equipped to undertake. Furthermore, even if a legislature should be constituted as the result of an election at large, the Court would have no control over it and would have no means of compelling such a legislature to redistrict the state in accordance with the constitutional mandate" (R. 218).

Of equal importance is the rule that Federal courts of equity will not interfere with the enforcement of state laws except ". . . to prevent irreparable injury which is clear and imminent." **American Federation of Labor v. Watson,** 327 U. S. 582, 593. This case presents no irreparable injury and certainly none which is clear and imminent. The injury is suffered by all of the citizens of Tennessee. Indeed, the appellants bring the action "on behalf of all other voters of the State of Tennessee" (R. 4).

Even in dissenting opinions, this Court has recognized that Federal courts should be most hesitant to enjoin the holding of state elections. In **MacDougall v. Green,** Mr. Justice Douglas pointed out that:

"Federal courts should be most hesitant to use the injunction in state elections. See Wilson v. North Carolina, 169 U. S. 586, 596, 42 L. Ed. 865, 871, 18 S. Ct. 435. If federal courts undertook the role of superintendence, disruption of the whole electoral process might result, and the elective system that is vital to our government might be paralyzed. Cf.

> Johnson v. Stevenson, 170 F. 2d 108. The equity court, moreover, must always be alert in the exercise of its discretion to make sure that its decree will not be a futile and ineffective thing." 335 U. S. 290.

And in **South v. Peters**, 339 U. S. 276, 280, Mr. Justice Black considered the question of the supervision of an election by the Court.

That the cure might be worse than the disease was pointed out by the District Court when it said:

> "It would lead to serious geographical inequalities and other discriminations, probably to a greater extent than those presently existing" (R. 218).

An injunction could not be issued without a finding by the Court that the present apportionment laws are unconstitutional. As previously indicated, the result would be the destruction of the legislative branch of the state government. **Kidd v. McCanless**, 200 Tenn. 282. This grave problem was recognized by the District Court:

> "In view of this decision, the plaintiffs recognize that the Court, if it declared the existing apportionment statute unconstitutional, would be required to go further and devise an appropriate remedy so as to avoid a disruption of state government" (R. 217).

The issuance of an injunction would be impractical and contrary to all existing equitable principles.

The second plan suggested by the appellants is likewise unsound.

If the Court determines that it is without jurisdiction to issue an injunction, then it must likewise determine that it is without authority to make a declaration of the type suggested by the appellants. In **Colegrove v. Green**, 328 U. S. 549, the Court said:

". . . the test for determining whether a federal court has authority to make a declaration such as is here asked, is whether the controversy 'would be justiciable in this Court if presented in a suit for injunction.'" 328 U. S. 552.

If the Court determines it has no jurisdiction to issue an injunction, then a declaration that a violation of appellants' rights had occurred would be an effort on the part of the Court to do indirectly what it is saying it cannot do directly. This, the Court has said, it will not do. **Colegrove v. Green**, 329 U. S. 549, 555.

A declaration by the Court that a violation of appellants' rights have occurred would be nothing less than a declaration that the present apportionment laws are unconstitutional, and thus, in effect, a holding that the government of the State of Tennessee is operating illegally. All activities of the state government would be adversely affected, and the result could be disastrous.

Thus, neither of the suggested remedies is feasible or legally possible.

If this Court finds that there is no justiciable issue as to either the appellants or the appellees, the appeal should be dismissed. The Court must determine whether the District Court has jurisdiction of the subject matter. If the District Court does have jurisdiction, it cannot make a declaration of rights unless this Court will direct the District Court to grant specific equitable relief.

To remand the case without instructions would be nothing less than political coercion. This Court should not clothe a political strategem with the cloth of legal respectability.

VIII.

THE REMEDY LIES WITH THE ELECTORATE AND NOT WITH THE JUDICIARY.

The appellants assume that if an injury can be shown, it necessarily follows that the Court can grant relief. They also assume that they have exhausted all avenues of relief.

Neither of these assumptions is correct.

To assume that equity will grant relief merely because an injury is shown, is to assume the law to be what it has never been. For instance, cases involving marital difficulties, especially where children are concerned, are of great social and moral importance. Nevertheless, neither law courts nor equity courts can grant divorces or effect adoptions **in the absence of statutory authority.**

In **Guaranty Trust Company of New York v. York**, 326 U. S. 99, the Court said:

> "Equitable relief in a federal court is of course subject to restrictions: the suit must be within the traditional scope of equity as historically evolved in the English Court of Chancery." 326 U. S. 105.

Again, in **Colegrove v. Green,** 328 U. S. 549, the Court emphasized the principle that the courts are not authorized to grant relief merely upon the showing that a constitutional provision has been violated:

> "The Constitution has many commands that are not enforceable by courts because they clearly fall outside the conditions and purposes that circumscribe judicial action. Thus, 'on demand of the executive authority,' Art. 4, § 2, of a State it is the duty of a sister State to deliver up a fugitive from justice. But

> the fulfillment of this duty cannot be judicially enforced. **Kentucky v. Dennisin,** 24 How. (U. S.) 66, 16 L. Ed. 717. The duty to see to it that the laws are faithfully executed cannot be brought under legal compulsion, **Mississippi v. Johnson,** 4 Wall. (U. S.) 475, 18 L. Ed. 437. Violation of the great guaranty of a republican form of government in States cannot be challenged in the courts. **Pacific Teleph. & Teleg. Co. v. Oregon,** 223 U. S. 118, 56 L. Ed. 377, 32 S. Ct. 224. The Constitution has left the performance of many duties in our governmental scheme to depend on the fidelity of the executive and legislative action and, ultimately, on the vigilance of the people in exercising their political rights." 328 U. S. 556.

Thus, it does not follow that if the appellants have suffered an injury, the Court will grant relief.

Peculiarly political questions must, as the Court said in **Colegrove v. Green,** be settled in the political arena.

The appellants do not represent a weak segment of the population or a minority group. On the contrary, they aver that they represent the more populous sections of the state. The case does not present a situation where the appellants are without the means of self-help. Compare **Edwards v. California,** 314 U. S. 160, 174. They themselves vote, are represented in the Legislature, and have the means with which to arouse the public feeling which will ultimately result in the achievement of the goal they seek. As this Court said in **MacDougall v. Green,** 335 U. S. 281, 284:

> ". . . the latter have practical opportunities for exerting their weight at the polls not available to the former."

If the remedy for unfairness in **Congressional representation** is at the polls, as this Court has said, the remedy

for inequality of **representation in state legislatures** is likewise at the polls.

In **Colgrove v. Green**, the Court said:

> ". . . the remedy ultimately lies with the people." 328 U. S. 552.
>
> "The remedy for unfairness in districting is to secure State legislatures that will apportion properly, or to invoke the ample powers of Congress." 328 U. S. 556.

To say, as this Court said in **Colegrove v. Green**, that

> "It is hostile to a democratic system to involve the judiciary in the politics of the people" (328 U. S. 553-554);

is merely another way of saying what the Court said in **Minersville School Dist. v. Gobitis**, 310 U. S. 586,

> "To fight out the wise use of legislative authority in the forum of public opinion . . . serves to vindicate the self-confidence of a free people" (310 U. S. 600); "Except where the transgression of constitutional liberty is too plain for argument, personal freedom is best maintained . . . when it is ingrained in the people's habits and not enforced . . . by the coercion of adjudicated law." 310 U. S. 599.

The events occurring in Tennessee in recent years, and now a matter of record in Tennessee's basic law, do not support the appellants' assertion that all avenues of relief are closed to them. Tennessee's present constitution was adopted in 1870. It remained unamended for more than eighty years, despite the fact that many efforts were made to have the Tennessee Legislature authorize a constitutional convention. However, when the desire of the public became sufficiently great the Legislature authorized the holding of the convention. The convention was held in

1953 and the Tennessee constitution was amended. The authorization for the holding of the convention was brought about by an aroused and enlightened public.

The same goal can, and will, be achieved in connection with reapportioning legislative seats.

To suggest, as do the appellants, that no avenue of relief is open is to suggest that the citizenry of Tennessee is incapable of self-government. This postulate we unequivocally reject.

.....
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Certificate of Service.

I, George F. McCanless, Attorney General of Tennessee, one of the attorneys for the appellees, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the ..... day of March, 1961, I served

copies of the within Brief for Appellees on Charles W. Baker et al., appellants, by mailing said copies in a duly addressed envelope, postage duly prepaid, to their counsel of record, namely:

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APPENDIX A.

THE APPELLEES DO NOT HOLD ELECTIONS FOR MEMBERS OF THE LEGISLATURE.

The appellees, the Secretary of State, the Attorney General, the Coordinator of Elections, and the members of the State Board of Elections, do not call or hold the elections for members of the Legislature.

The elections for members of the Legislature are held by the county commissioners of elections in each of the ninety-five counties. The county commissioners of elections are not parties to the action and are not represented in the suit.

The State Board of Elections is composed of three members who are elected by the Legislature for a term of six years. Sections 2-901 and 2-905, Tennessee Code Annotated, provide as follows:

> "2-901. Board of elections—Election of members. —There shall be elected, in the manner herein provided, three (3) persons to be known as the board of elections for the State of Tennessee, which shall exercise all the powers conferred by this chapter."

> "2-905. Date of election—General assembly members voting.—The election of said members of the board of elections shall be held every six (6) years beginning with the year 1953, by a joint resolution of both houses of the general assembly, and the election shall take place in a joint session of both houses of the general assembly in which each member of said general assembly shall be entitled to one (1) vote.

> "Provided, further that elections choosing members of the board of elections shall be held on any date fixed by joint resolution of both houses of the general

assembly, but shall be held prior to the first Monday in March, of the year in which the legislature meets."

The State Board of Elections does not hold elections. Its duty is to appoint a board of three commissioners of elections for each of the ninety-five counties. Section 2-1001, Tennessee Code Annotated, provides as follows:

"2-1001. Appointment of county election commissioners.—The board of elections of the state of Tennessee shall appoint, on the first Monday in April, each odd year, three (3) commissioners of elections for each county, to serve for a term of two (2) years and until their successors are appointed and qualified."

The State Board of Elections does not supervise the actions of the several county commissioners of elections, and it is not authorized to do so.

After appointing the county commissioners of elections for a particular county, the State Board of Elections has no other duties or responsibilities in connection with the holding of elections in that county except to fill any vacancy that may occur on the county board. Section 2-1004, Tennessee Code Annotated, provides as follows:

"2-1004. Term—Vacancies—Filling.—Said commissioners shall hold their office until their successors are appointed, and any vacancy shall be filled by the state board of elections by appointment."

Candidates for the Legislature must file their qualifying papers with the county commissioners of elections. No other board or commission is authorized to receive and file such qualifying papers.

In order to have his name placed on the ballot, a candidate for the Legislature must qualify with the county commissioners of elections in one of two ways. His name

may be certified as nominee of a political party or he may file a petition signed by at least twenty-five qualified voters, as an independent candidate. Sections 2-1205 and 2-1206, Tennessee Code Annotated, provide as follows:

"2-1205. Names to be placed on ballots—Duties of chairman of board of election commissioners.—The ballots printed for use under the provisions of this chapter shall contain the names of all the candidates who have been put in nomination by any caucus, convention, mass meeting, or other assembly of any political party in this state at least thirty (30) days previous to the day of election. It shall be the duty of the chairman of the commissioners to have printed all necessary ballots for use under the provisions of this chapter, and he shall cause to be printed upon said ballots the names of candidates so nominated, upon the written request of any one of the candidates so nominated, or upon the written request of any qualified voter who will affirm that he was a member of said caucus, and the name presented by him was the nominee of said caucus, convention, or mass meeting, or other assembly, of any such political party.

"In counties where voting machines are used the ballot shall contain the names of nominated candidates who have been nominated by caucus, convention or mass meeting or other assembly of any political party in the state at least twenty-five (25) days before the date of election. This shall be given to chairman of election commission or to the secretary.

"2-1206. Independent candidates—Petition to place name on ballots—Filing.—The said officer shall cause to be printed upon said ballots the name of any qualified voter who has been requested to be a candidate for any office, by a written petition signed by at least twenty-five (25) citizens qualified to vote in the elec-

tion to fill said office, when such petition has been given him at least thirty (30) days previous to the election.

"Where a petition is required to be filed in more than one (1) county, certified duplicates of such nominating petition duly attested under oath to be correct by one of the signers thereof shall be sufficient to be filed with the respective county election commission in lieu of the original but the original thereof shall be filed with the county chairman of at least one (1) of the counties participating in such election. The attested signatures of one of the signers referred to, may be a photo copy of the signatures of the original petition."

The officials who actually conduct the elections are appointed by the county commissioners of elections. Section 2-1101, Tennessee Code Annotated, provides as follows:

"2-1101. Officials conducting elections—Vacancies on board—Filling.—All elections shall be opened and held by the officers, judges, and clerks of elections, appointed by the commissioners of elections, according to law, and if any of said officers, judges, or clerks shall fail to attend, other persons shall be selected to fill such vacancy by a majority of the election officers in attendance."

After the election has been held, the county commissioners of elections are required to issue certificates of election to the successful candidates and to certify and forward to the Secretary of State one copy of the poll books. Thereafter the Governor also issues certificates of election to the winning parties. Sections 2-1414 to 2-1416, Tennessee Code Annotated, provide as follows:

"2-1414. Certificate of election for members of general assembly—Transmission of vote to secretary of

state.—The person receiving the highest number of votes for member of the general assembly shall be declared duly elected, and a certificate of election issued to him, and a statement of the vote made out and transmitted immediately to the secretary of state."

"2-1415. Copy of poll books in all elections for legislature forwarded to secretary of state.—In all senatorial and representative districts, it shall be the duty of the commissioners of elections of each county, within ten (10) days after said election, to certify and forward to the secretary of state one (1) copy or set of the poll books."

"2-1416. Certificates of election issued to members of legislature.—When the results of such election shall have been ascertained and announced, the governor shall issue certificates of election to the persons receiving the largest number of votes in said district, which certificates shall be prima facie evidence in such election; and the commissioners of elections of the several counties, singly electing one or more representatives, shall issue certificates of election to the persons receiving the largest number of votes cast at said election."

Thus, the members of the State Board of Elections have no duties whatsoever in connection with the calling and holding of elections for members of the Legislature.

The Secretary of State, as shown above, has certain minor duties after the elections are held. He has no duties in connection with the holding of the elections. He is required, under the provisions of Section 2-312, Tennessee Code Annotated, to furnish to the several counties forms and supplies **for the preliminary registration of voters.** His only other duties relate to the preparation of absentee

ballot forms. Section 2-1607, Tennessee Code Annotated. He certainly does not call or hold elections for members of the Legislature.

The Election Coordinator's duties involve training programs for newly appointed election officials, the interpretation of election law questions, and the preparation of manuals of the election laws. He has no duties in connection with the holding of elections for members of the Legislature. Section 2-111, Tennessee Code Annotated.

The Attorney General of Tennessee has no duties whatsoever in connection with the holding of elections for members of the Legislature.

APPENDIX B.

CONSTITUTION OF TENNESSEE.

Article I.

Sec. 17. Open courts—Redress of injuries—Suits against the State.—That all courts shall be open; and every man, for an injury done him in his lands, goods, person or reputation, shall have remedy by due course of law, and right and justice administered without sale, denial, or delay. Suits may be brought against the State in such manner and in such courts as the Legislature may by law direct.

TENNESSEE CODE ANNOTATED.

20-1702. Actions against state prohibited.—No court in the state shall have any power, jurisdiction, or authority to entertain any suit against the state, or against any officer of the state acting by authority of the state, with a view to reach the state, its treasury, funds, or property, and all such suits shall be dismissed as to the state or such officers, on motion, plea, or demurrer of the law officer of the state, or counsel employed for the state.

APPENDIX C.

CONSTITUTION OF TENNESSEE.

Article II.

Sec. 1. Division of powers.—The powers of the Government shall be divided into three distinct departments: the Legislative, Executive and Judicial.

Sec. 2. Limitation of powers.—No person or persons belonging to one of these departments shall exercise any of the powers properly belonging to either of the others, except in the cases herein directed or permitted.

Sec. 3. Legislative authority—Term of office.—The Legislative authority of this State shall be vested in a General Assembly, which shall consist of a Senate and House of Representatives, both dependent on the people; who shall hold their offices for two years from the day of the general election.

Sec. 4. Census.—An enumeration of the qualified voters, and an apportionment of the Representatives in the General Assembly, shall be made in the year one thousand eight hundred and seventy-one, and within every subsequent term of ten years.

Sec. 5. Apportionment of representatives.—The number of Representatives shall, at the several periods of making the enumeration, be apportioned among the several counties or districts, according to the number of qualified voters in each; and shall not exceed seventy-five, until the population of the State shall be one million and a half, and shall never exceed ninety-nine: Provided that any county having two-thirds of the ratio shall be entitled to one member.

Sec. 6. Apportionment of senators.—The number of Senators shall, at the several periods of making the enumeration, be apportioned among the several counties or districts according to the number of qualified electors in each, and shall not exceed one-third the number of representatives. In apportioning the Senators among the different counties, the fraction that may be lost by any county or counties, in the apportionment of members to the House of Representatives, shall be made up to such county or counties in the Senate, as near as may be practicable. When a district is composed of two or more counties, they shall be adjoining; and no county shall be divided in forming a district.

APPENDIX D.

CONSTITUTION OF TENNESSEE.

Article III.

Section 1. Governor's executive power.—The Supreme Executive power of this State shall be vested in a Governor.

Article VI.

Section 1. Judicial power.—The judicial power of this State shall be vested in one Supreme Court and in such Circuit, Chancery and other inferior Courts as the Legislature shall from time to time, ordain and establish; in the Judges thereof, and in Justices of the Peace. The Legislature may also vest such jurisdiction in Corporation Courts as may be deemed necessary. Courts to be holden by Justices of the Peace may also be established.